Corporate Express Delivery Systems *and* Teamsters Local 886, affiliated with International Brotherhood of Teamsters, AFL–CIO, CLC. Case 17–CA–20076

December 19, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND HURTGEN

On September 15, 1999, Administrative Law Judge Pargen Robertson issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt his recommended Order as modified.[2]

We agree with the judge that the record establishes that the Respondent's owner-operators are employees within the meaning of Section 2(3). Thus, the owner-operators perform work which is substantially the same as that of employee drivers and constitutes the essential functions of the Respondent's normal operations as a package pickup and delivery service.[3] They work full time, are trained by the Respondent and need not have prior experience, and they do business in the Respondent's name with substantial guidance from and control of the Respondent. Although owner-operators must obtain and use their own vehicles, they are not permitted to use their vehicles to make deliveries for anyone other than the Respondent. Owner-operators purchase their insurance through a company designated by the Respondent. They are required to display the Respondent's logo on their vehicles and to wear certain color trousers, shirts, and shoes, if they opt not to wear uniforms. They have no proprietary interest in their routes and no significant opportunity for entrepreneurial gain or loss. The routes, the base pay, and the amount of freight to be delivered daily on each route are determined by the Respondent, and owner-operators have no right to add or reject customers.[4] Finally, the Respondent incurs no liability for unilaterally terminating an owner-operator's contract.

Accordingly, weighing all of the incidents of their relationship with the Respondent, we find that the owner-operators are employees and not independent contractors. See *Roadway Package System*, 326 NLRB 842 (1998).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Corporate Express Delivery Systems, Oklahoma City, Oklahoma, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

"(a) Within 14 days of this Order, offer immediate and full employment to Hildegard Kirk, Edwin Kirk, and Joseph Bennett to their former positions or, if those positions no longer exist, to substantially equivalent positions without prejudice to their seniority or any other rights or privileges previously enjoyed."

2. Insert the following as new paragraph 2(b) and reletter the subsequent paragraphs.

"(b) Make Hildegard Kirk, Edwin Kirk, Joseph Bennett, and Thomas McHargue whole for any loss of earnings and other benefits suffered as a result of the discrimination against them plus interest, in the manner set forth in the remedy section of the decision."

3. Substitute the following for paragraph 2(e).

"(e) Within 14 days after service by the Region, post at its facility in Oklahoma City, Oklahoma, copies of the attached notice marked "Appendix."[33] Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places were notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current em-ployees and former employees employed by the Respondent at any time since February 28, 1999.

4. Substitute the attached notice for that of the administrative law judge.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We have modified the judge's recommended Order in accordance with our decisions in *Indian Hills Care Center*, 321 NLRB 144 (1996), and *Excel Container*, 325 NLRB 17 (1997).

[3] See *Slay Transportation*, 331 NLRB No. 170 (2000).

[4] Owner-operators may within certain parameters, however, change delivery times on their routes.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate our employees concerning the activities of Teamsters Local 886, affiliated with International Brotherhood of Teamsters, AFL–CIO, CLC, or any other labor organization.

WE WILL NOT threaten our employees with plant closure because of union activities.

WE WILL NOT engage in surveillance of our employees' union activities.

WE WILL NOT threaten our employees with a cut in pay because of their union activities.

WE WILL NOT threaten our employees that it will be futile for them to support the Union.

WE WILL NOT discriminatorily enforce a no-solicitation rule against union solicitation.

WE WILL NOT unlawfully include a rule against employees discussing wages in our employee handbook.

WE WILL NOT terminate our employees because of their union activities.

WE WILL NOT issue written warnings to our employees because we suspect the employees of union solicitation.

WE WILL, within 14 days of this Order, offer immediate and full employment to Hildegard Kirk, Edwin Kirk, and Joseph Bennett to their former positions or, if those positions no longer exist, to substantially equivalent positions without prejudice to their seniority or any other rights or privileges previously enjoyed."

WE WILL, make Hildegard Kirk, Edwin Kirk, Joseph Bennett, and Thomas McHargue whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, plus interest.

WE WILL, within 14 days from the date of the Order, remove from our files any reference to the unlawful written warning and discharges of Thomas McHargue, Hildegard Kirk, Edwin Kirk, and Joseph Bennett and **WE WILL**, within 3 days thereafter, notify McHargue, Hildegard Kirk, Edwin Kirk, and Bennett in writing that this has been done and that the warning and discharges will not be used against any of them in any way.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of their rights guaranteed you by Section 7 of the National Labor Relations Act.

CORPORATE EXPRESS DELIVERY SYSTEMS

Mary Taves, Esq., for the General Counsel.
Terry L. Potter, Esq., of St. Louis, Missouri, for the Respondent.
Eddie Landers, of Oklahoma City, Oklahoma, for the Charging Party.

DECISION

PARGEN ROBERTSON, Administrative Law Judge. This matter was heard in Oklahoma City, Oklahoma, on May 26 and 27, 1999. The charge was filed on March 11 and amended on April 13 and May 18, 1999. A complaint issued on April 15, 1999.

The Respondent, Charging Party (Union), and General Counsel were represented and were afforded full opportunity to be heard, to examine and cross–examine witnesses, and to introduce evidence. The Respondent and General Counsel filed briefs. On consideration of the entire record and briefs, I make the following

I. JURISDICTION

Respondent admitted that at material times it has had an office and place of business at Oklahoma City as well as at locations throughout the United States, where it has been engaged in providing same–day delivery and related services; it conducted business from Oklahoma City during the 12 months ending March 31, 1999, including the purchase and receipt at Oklahoma City of goods valued in excess of $50,000 directly from outside the State and the receipt of gross revenue in excess of $50,000 from the sale and delivery of goods directly to points outside the State; and during that 12-month period it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the National Labor Relations Act (the Act).

Respondent Area Manager William Kennedy testified that its Oklahoma business primarily serves the pharmaceutical and banking industries. Their biggest local customer is McKesson.

II. LABOR ORGANIZATION

Respondent admitted that the Charging Party (Union) has been a labor organization at material times within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICE ALLEGATIONS

It is alleged that Respondent discharged employees in violation of Section 8(a)(3) and engaged in independent violations of Section 8(a)(1) of the Act.

The overriding disputed issue is whether people called owner/operators are employees. Respondent employed both owner/operator and company drivers in its delivery system. The alleged unfair labor practices were concentrated around Respondent's relationship with the owner/operators.[1]

The Act excludes from its definition of employee "any individual having the status of an independent contractor." Respondent alleges that the alleged discriminatees with the exception of Tom McHargue fall within that exclusion.

Are the Owner/Operator Drivers Employees?

Respondent contends that owner/operators, unlike company drivers, are independent contractors. The duties of the owner/operator and company drivers are similar.[2] Both function as drivers for the delivery of packages for Respondent and it is not disputed that company drivers are employees.

The General Counsel offered evidence regarding the independent contractor issue. As the name implies owner/operators, unlike company drivers, own their vehicles. Joseph Bennett started as an owner/operator in February 1997 when the company was called US Delivery. He was told that he would have to have a van size ¾ ton or larger, less than 3 years old and with no more than 50,000 miles. Edwin Kirk responded to an ad from Respondent in July 1998 stating that owners of vans, minivans or full–sized vans were needed. Kirk applied with Respondent. He had a minivan at the time and General Manager Rick Johnson asked him if he could get a full-size van. Rick Johnson faxed a letter to Richardson Ford stating what Kirk would be earning in order to assist Kirkin securing financing on a full-size van. Kirk testified that he would not have qualified for financing without Johnson's fax.

Hildegard and Edwin Kirk and Rocky Terrel and Joseph Bennett were required to fill out applications and take drug tests and background checks when they applied to work as owner/operators with Respondent. H. Kirk interviewed with Respondent's general manager who asked her what type van she was driving. Kirk replied she was driving a minivan and the general manager said that was all right. When she signed an agreement with Respondent the general manager told her that the company offered the insurance she needed for her vehicle and the premiums would be deducted from her biweekly pay. H. Kirk was not given an option to select any other insurance carrier or policy. The general manager told Hildegard Kirk of the available routes and specified the one he had selected for her. She was trained by riding with another driver (owner/operator) for about 4 days. Hildegard Kirk told the general manager that she did not like that route and he assigned her to another route. She rode with another owner/operator for 3 days to train on that route. Edwin Kirk testified that he was trained for 3 days by riding with the driver that had the route before him. Other owner/operators had similar training. Joseph Bennett was scheduled to train by riding with a supervisor but when he caught up with the supervisor he said he had to return to town. Bennett completed that route alone and that was all the training he received.

All the owner/operators signed agreements with Respondent stating their positions were those of independent contractors. All were paid on the basis of a fixed rate plus a varying amount depending on the amount of freight delivered on a particular day.

Owner/operators Rocky Terrel and Joseph Bennett were originally hired as "special drivers." General Manager Rick Johnson told each of them that there were no routes available at the time each was hired. Bennett was given a regular route almost immediately after being hired and before he actually started working as a special driver. When a route came open, Rick Johnson told Terrel about the route. After discussion, Terrel and Johnson agreed for Terrel to take the route. Subsequent to Rocky Terrel changing to his present route, he asked to be switched back to his former route. Respondent denied his request because his former route had already been filled.

Rocky Terrel's wife Cindy also started working for Respondent as a special owner/operator driver. Later she was identified as an employee for her husband's company. However, Bill Kennedy told Rocky Terrel that Respondent's computers were not set up to issue checks to his company and checks were subsequently issued in Rocky Terrel's name to cover work on two routes handled by Rocky and his employee (i.e., his wife).

H. Kirk worked around 55 hours a week as owner/operator for Respondent. Her work for Respondent was her regular work. Most owner/operators did not have other employment while working for Respondent. However, Joseph Bennett told Rick Johnson during his interview that he did morning delivery for the Tulsa World and did not want to quit that job. Bennett told Rick Johnson that he would not take the job with Respondent if required to give up the Tulsa World job. Bennett continued to hold the job delivering the Tulsa World but he did not use the same vehicle for both jobs. Owner/operator Rocky Terrel testified that he worked full time for Respondent and that he averaged around 89 or 90 hours a week.

Hildegard Kirk was required to apply with the Labor Department for nonworkman's compensation coverage. Respondent furnished the forms for her application for nonworkman's coverage. Kirk was required to sign the forms and send them in. Respondent suggested that H. Kirk use the name Hilda's Delivery Service on her nonworkman's coverage.

Respondent paid its owner/operators every 2 weeks. Hildegard Kirk was paid in her own name rather than as Hilda's Delivery Service. Respondent unilaterally set her compensation. There were no negotiations on the amount of compensation. As shown above Rocky Terrel was paid in his name for both the route he covered and the one covered by his wife.

Hildegard Kirk's work started at 1:15 p.m. When both Hildegard Kirk and Rocky Terrel started work, each went to

[1] However, Respondent does not dispute that alleged discriminatee Thomas McHargue is an employee.

[2] Hildegard Kirk testified that compensation and benefits are different for owner/operators. While company drivers receive hourly pay, health insurance, profit sharing, and vacation time and do not own their vehicles, owner/operators are not paid by the hour, do not receive health insurance, profit sharing, and vacation time and do own their vehicles.

Respondent's office and picked up his or her daily route sheet and keys (as well as key cards) required for entry into some of the delivery points. Edwin Kirk started at a stop on his route and checked into Respondent's office later during his route. Owner/operators were required to arrive at specific delivery points at time specified on his or her route sheet and to notify Respondent if he or she missed that appointed time by more than 10 minutes. The operations manager would then tell the owner/operator whether to go on with the delivery and write down the time or to pass that stop. Owner/operators received additional pay for additional stops. However, owner/operators had no input into the decision to make additional stops. Respondent made that decision. Owner/operators were not given an opportunity to drum up additional business for themselves. The owner/operators were given $20 for referral of a new customer for Respondent. However, the owner/operator did not receive additional compensation other than the $20, if Respondent successfully picked up business as the result of that referral. The owner/operators could not deviate from the order of stops set out on the route sheet. At the end of the workday most owner/operators returned to Respondent's office and turned in their route sheet and keys.

On occasions when an owner/operator needed a day off for personal reasons or illness, Respondent would arrange a backup driver. Although H. Kirk never did so, she understood that an owner/operator could make arrangements with another driver to take the owner/operator's route if the other driver was familiar with that particular route. Owner/operators could not hire someone to drive their route.[3] Rocky Terrel testified that owner/operators were required to submit a completed form (GC Exh. 40) requesting time off and Respondent was to take care of his routes while he was off. Rocky Terrel did not pay the person that ran in place of Terrel. Respondent handled that matter.

Rocky Terrel testified that he could not sell or trade his routes to anyone else. He has seen postings for available Saturday routes with a message to see someone if interested. He recalled a memo instructing the drivers to not discuss problems such as being late, with a customer. Instead the driver was to inform the customer he or she could call Respondent's office to discuss the problem.

The owner/operators were directed by Respondent to refer all customer delivery related complaints back to its office. Owner/operators were not permitted to extend credit to customers without permission. The owner/operators were not permitted to work for another employer.

Respondent determined whether the owner/operators vehicle met its standards for specific routes. Owner/operators were required to place magnetized company decals on both sides of their vehicle (GC Exh. 39). Owner/operators were required to wear navy pants and company shirts that were either navy or white or striped. Hildegard Kirk purchased her own uniform and the decal for her shirt. However, owner/operators were allowed to use the Company's uniform service. Rocky Kirk was wearing a company uniform during his testimony. It included a short–sleeved polo shirt with Respondent's logo, blue shorts, and dark shoes. He was required to wear that uniform during deliveries.

Respondent maintains all records on owner/drivers including the route sheets and manifests[4] that are turned in daily. Owner/operators were required to maintain daily route sheet for each particular route. The owner/operators were paid each 2 weeks and insurance premiums on their vehicle, pagers rental, and miscellaneous charges such as for their drug test and physical examination, were deducted from their pay. Each owner/operator was required to submit a 2-week voucher[5] in order to receive pay. All drivers including owner/operators[6] and company drivers were required to have pagers. The owner/operators were permitted to use Respondent's bathroom and break room.

Drivers are required to phone in to Respondent (a voice mail for each driver) several times during each route for updates on pickups.

Respondent's offer regarding the independent contractor issue included Area Operations Manager William Kennedy testifying that an application is required for its company driver positions (R. Exh. 9). Respondent conducts a background check with OSPI and the motor vehicle record is pulled on the applicant. Each applicant is given drug and physical examinations along with both written and actual driving tests.

Owner/operator applicants are not required to take driving tests. Company drivers may interchange company vehicles whereas owner/operators must use their own vehicles as specified in their agreement with Respondent. Owner/operators take their vehicles home and may start their day's work at delivery points away from the terminal. Employees have clock-in times while owner/operators do not. Employees rent their uniforms from Cintas. Each employee has 10 sets of uniforms and each rotate turning in 5 uniforms a week to Cintas for cleaning. Owner/operators purchase their uniforms.

William Kennedy disagreed with the testimony that owner/operators may not change their route. He testified that Respondent does not care whether delivery times are changed and that owner/operators routinely change their times (see Tr. 245–249; R. Exh. 6 regarding changes in Rocky Terrel's route). However, company drivers are required to run routes in proper sequence on penalty of disciplinary action. The parties stipulated Joint Exhibit 1 into evidence. That is a sample of route sheets over two 1-week periods. Those route sheets do show that some stops were made out of sequence and that it was not unusual for deliveries to be made more than 10 minutes after their scheduled time.

Owner/operators have an option of arranging their own replacements from other owner/operators when absent or by notifying Respondent and having Respondent provide a driver as replacement. There are scheduled and unscheduled absence

[3] However, as shown here, Rocky Terrel was given permission to hire his wife Cindy for another route than the one he was driving.

[4] Rocky Terrel testified that the route sheets reflect the regular route each day while the manifest (G.C. Exh. 14) reflects extra freight delivered on that particular day.

[5] Each voucher should reflect the cumulative route sheets and manifests for the particular 2-week period.

[6] Owner/operators were sometimes referred to as contract drivers.

reports for both company drivers and owner/operators. That is so because the owner/operators' pay changes because of absences.

There are no provisions for disciplinary action[7] for owner/operators.

Some owner/operators have layovers during their routes from a few minutes to 6 hours. There are no restrictions on the owner/operators' time during a layover.

In 1998 the average annual income for each company driver was $18,000.[8] During that same period, the average annual income for each owner/operator was $32,000.[9]

None of the policies in Respondent's employee handbook (GC Exh. 3) applied to owner/operators. Kennedy testified that owner/operators may hire someone to assist in their work for Respondent. He recalled that spouses of the owner/operator are employed in some cases as well as "sons, daughters, wives, husbands, aunts, uncles, whatever."[10] However, on cross-examination Kennedy admitted that Respondent conducts the same background checks and drug tests regardless of whether the driver is the owner/operator or an employee of the owner/operator.

William Kennedy denied that owner/operator Angela Loyall was disciplined because she took home a package that should have been delivered during her route. Instead, Respondent wrote Loyall expressing that the package should have been turned back to Respondent since it was not delivered before the end of her workday. Kennedy testified that Joe Bennett was docked 40 hours pay because he forgot his keys and Respondent had to cover part of Bennett's route. If that had happened to a company driver the employee would have received disciplinary counseling (see R. Exh. 16).

Company drivers are normally limited to 55 hours work each week whereas owner/operators have no limit on the number of hours each of them work.

Findings

Credibility

I was impressed with both the demeanor and testimony of Hildegard and Edwin Kirk, Rocky Terrel, and Joseph Bennett. Each of them appeared to testify truthfully under both direct and cross-examination even on those occasions when answers appeared to be opposed to the witness' interest. I credit their testimony. William Kennedy was inconsistent in his testimony. Despite testimony that owner/operators were not treated like company drivers, he admitted on cross-examination that he told Rocky Terrel not to solicit for the Union and he recently told both owner/operators and company drivers that vacation privileges were being suspended. Kennedy also admitted that despite his testimony that owner/operators are not subject to disciplinary action, they are written up for performance deviations and for substandard performance. Kennedy was evasive on cross-examination. In consideration of his demeanor and full testimony, I do not credit him to the extent his testimony conflicts with credited evidence.

Conclusions

Recently the Board considered whether owner/operator drivers are independent contractors and as such, excluded from the Act's definition of employee, in *Roadway Package System,* 326 NLRB 842 (1998), and *Dial-A-Mattress Operating Corp*., 326 NLRB 884 (1998).[11] In *Roadway,* the Board referred back to earlier *Roadway* decisions where the independent contractor argument was rejected in holding that the drivers "bear few of the risks and enjoy little of the opportunities for gain associated with an entrepreneurial enterprise" and Roadway had "substantial control over the manner and means" of performance by their drivers. The Board considered a series of factors in *Roadway* including duties and responsibilities;[12] vehicles;[13] business

[7] However, William Kennedy admitted that owner/operators are written up for performance deviations and for substandard performance. See GC Exhs. 43–54 and Tr. 308–309 and 314.

[8] However, William Kennedy admitted on cross that $18,000 did not include such things as withholding taxes, unemployment compensation, vacation and sick time and that Respondent paid all maintenance cost for vehicles operated by company drivers.

[9] That $32,000 represents a gross amount and the owner/operator is responsible for costs associated with maintaining his or her vehicle.

[10] William Kennedy admitted on cross-examination that he did not recall any employee of an owner/operator that was not also a family member of that owner/operator.

[11] See *NLRB v. United Insurance Co. of America*, 390 U.S. 254 (1968).

[12] The Board found that Roadway's contract with the drivers was terminable by either or both parties; drivers may select their own routes; the drivers work full time for Roadway averaging 9- to 9-1/2-hour shifts; and the drivers must wear Roadway-approved uniforms. Here, Hildegard Kirk rejected her first assigned route and was given another route; owner/operators work full time for Respondent with Hildegard Kirk averaging 55 hours a week; Rocky Terrel talked with the general manager before agreeing to accept his first regular route and he worked approximately 90 hours a week for Respondent; Respondent approved the vans used by Rocky Terrel and Hildegard Kirk; when Edwin Kirk applied, he had a minivan and Respondent asked him to get a full-size van; according to their contract with Respondent, owner/operators are prohibited from using their van for other business; their insurance policy does not cover work other than for Respondent; owner/operators were required to apply for nonworkers compensation insurance on forms supplied by Respondent and Hildegard Kirk was told to use the name Hilda's Delivery Service on her application; Rocky Terrel originally used the name D&L Distributing, but was told Respondent's computers were not set up for pay to anything other than an individual (afterward, pay for both Rock Terrel and his wife (employee) were issued to Rocky Terrel); owner/operators are paid biweekly an amount unilaterally established by Respondent; owner/operators drive routes specified by Respondent; replacement drivers are arranged by Respondent on occasion when an owner/operator misses work and fails to provide their own replacement (owner/operator Rocky Terrel worked as a special driver when he first started for Respondent and during that time he backed up regular drivers); and the drivers are required to phone in anytime he or she is going to be more than 10 minutes late arriving at a delivery point.

[13] The drivers lease or buy their vehicles and must restrict the use of the vans to Roadway work unless the identifying insignia is removed or covered; drivers may operate additional vehicles with Roadway's consent; and the drivers are responsible for maintaining their own vehicles. Here, owner/operators are required to use vans approved by Respondent; Respondent provides owner/operators' training using either owner/operator or company drivers; they are required to place magnetized contact decals on both sides of their vehicle; and until recently,

support package;[14] compensation and financial support,[15] and proprietary interest.[16] The *Roadway* Board held as,

> in *United Insurance*, the drivers here do not operate independent businesses, but perform functions that are an essential part of one company's normal operations; they need not have any prior training or experience, but receive training from the company; they do business in the company's name with assistance and guidance from it; they do not ordinarily engage in outside business; they constitute an integral part of the company's business under its substantial control; they have no substantial proprietary interest beyond their investment in their trucks; and they have no significant entrepreneurial opportunity for gain or loss. [326 NLRB at 851.]

The General Counsel argued that the owner/operators do not operate independent businesses but perform functions that are an essential part of Respondent's normal operations. Owner/operators perform the same duties as company drivers and those duties are integral to Respondent's operations as a package pickup and delivery service. The owner/operators' contract with Respondent and their insurance, provide that owner/operators may *not* use their vehicles to deliver goods for anyone other than Respondent.[17] Their work for Respondent is full time. Owner/operators are not free to add or delete customers. That is handled unilaterally by Respondent. The owner/operators contract with Respondent provides that Respondent provides the base compensation for each route. That base compensation is not negotiated but is established unilaterally by Respondent. Respondent decided the amount of freight to be delivered by each owner/operator each day. Respondent may unilaterally terminate its contract with owner/operators without incurring liability.

The General Counsel goes on to argue that the owner/operators have no substantial proprietary interest beyond their investment in their vans or trucks and they have no significant entrepreneurial opportunity for gain or loss. As shown above, Respondent could and did on occasion, unilaterally change routes for owner/operators and it terminated the contract with an owner/operator before the actions alleged herein. Contrary to testimony of several owner/operators, the daily route sheets proved that those drivers did change delivery times and sequence.

Respondent assisted some owner/operators to purchase their van or truck. Owner/operators are responsible for their insurance coverage but record evidence illustrated the owner/operators were required to use insurance recommended by Respondent.[18] Insurance premiums were deducted from owner/operators' pay.

In *Dial-A-Mattress Operating Corp.,* the Board applied a similar test to the one it applied in *Roadway*, but found that those owner/operators were independent contractors. Among other things the Dial-A-Mattress owner/operators oftentimes formed corporations.[19] The owner/operators frequently hired employees including drivers and helpers.[20] Their trucks or vans could be used in other work provided they did not work for Dial-A-Mattress competitors.[21] Several of the owner/operators did not drive trucks or vans themselves.[22] Instead they used their own employees as drivers.

It is clear from my comparison of the cases and the facts here that Respondent proved a weaker case for an independent contractor finding than the employer did in *Roadway*. I find in accord with the Board's decisions in *Roadway* and *Dial-A-Mattress* that the owner/operators are not independent contractors and are employees as defined in the Act.

The 8(a)(1) Allegations:

Interrogation

Rick Johnson phoned owner/operator Jim Dunn shortly after the February 28 union meeting. Johnson asked Dunn who was responsible for starting the union movement. Dunn replied that he did not know. Johnson said that a memo had already been sent from the "corporate office that they would close the doors and none of us would have a job." A few days after that conversation, Dunn had a phone conversation with William Kennedy. Dunn had phoned Kennedy regarding his route. During that conversation Dunn told Kennedy that Rick Johnson had called him and was very upset and that Johnson had said that if the Union persisted and if it did go through they would have to close the doors and none of us would have jobs. Kennedy offered "very little response" to Dunn's statement.

owner/operators were required to use insurance selected by Respondent.

[14] Roadway provided a package at an $8-per-day charge to furnish each driver with a clean uniform each day; the lease of a required scanner and computer; an annual DOT inspection; and a vehicle washing service. Here, the credited evidence proved that owner/operators usually buy their uniform but that they may use the Cintas rental service used by company drivers.

[15] Both Roadway and Respondent contract drivers were responsible for the withholding and payment of their own Federal, state and local taxes. Neither Roadway nor Respondent provided any contract driver benefits including vacation, holidays, disability, or retirement.

[16] Roadway argued that it offered propriety interest to drivers for their routes beginning in 1994. There was evidence of some instances of drivers selling portions of their respective routes after that date. Respondent did not offer propriety interest to its owner/operators. None of the owner/operators were shown to be able to sell all or portions of their routes.

[17] When first interviewed, Joseph Bennett told Respondent that he would not give up his morning route delivering newspapers. However, Bennett used a different vehicle for the morning newspaper delivery.

[18] William Kennedy testified that Respondent changed its policy and that owner/operators are now free to use insurance other than that recommended by Respondent.

[19] Here, despite some owner/operators forming separate legal entities, they were told that Respondent's computers were set up so that checks could be made out only personally to the owner/operator.

[20] Here William Kennedy estimated that 10 percent of the owner/operators hired employees but his testimony on cross-examination proved that all those employees were spouses or children of the owner/operator.

[21] All of Respondent owner/operators were prohibited from using their authorized vehicles for other work. Even Joseph Bennett, the one owner/operator that was permitted to retain prior work delivering a morning newspaper, used another vehicle for that work.

[22] All the owner/operators drove vehicles even though a small percentage also hired a close relative to drive an additional route.

Respondent's area operations manager, William Kennedy, issued a written warning to Thomas McHargue on March 17, 1999. Operations Manager Carol Miller took McHargue to Kennedy's office. Miller, Kennedy, and McHargue were present in Kennedy's office. Kennedy said to McHargue that he had been soliciting some of the contract drivers at McKesson. Kennedy asked McHargue if he had any comments. McHargue replied that he did not even go to McKesson. McHargue denied that he said anything to anyone about the Union.

Threat of Closure

As shown above, Rick Johnson phoned Jim Dunn[23] shortly after the February 28 union meeting. After Johnson asked Dunn who was responsible for starting the union movement Johnson said that a memo had already been sent from the "corporate office that they would close the doors and none of us would have a job." A few days after that conversation Dunn had a phone conversation with William Kennedy. Dunn had phoned Kennedy regarding his route. During that conversation Dunn told Kennedy that Rick Johnson had called him and was very upset and that Johnson had said that if the Union persisted and if it did go through, they would have to close the doors and none of us would have jobs. Kennedy offered "very little response" to Dunn's statement.

Within the next 2 weeks Dunn again phoned Kennedy. Dunn told Kennedy that he had changed his mind and that he did not wish to support the Union. Kennedy responded that Dunn's name had come up. Dunn said that he had solicited two people and he would cease his activities for the Union. Dunn also said that he felt like changes should be made but he now felt the Union was not the answer and that maybe they could somehow get together and settle their differences without a third party. Kennedy agreed to that. Kennedy set it up so those drivers could come in on Saturdays and talk to him if the driver had a pay discrepancy.

Hildegard Kirk testified about talking with supervisors about the Union on March 4 or 5. Kirk talked with Assistant Operations Manager David Umbarger and Dispatcher Barbara Dawson. H. Kirk asked Umbarger and Dawson if they had heard the rumor that a group of owner/operators were trying to get the Union in. Umbarger replied, "yes, know about it and the word from the office in Houston[24] has already come down that they would rather shut the door than let the union come in." H. Kirk had several discussions with those supervisors. On one occasion Barbara Dawson said that the Union was a really bad deal and that when Wilson Food Company tried to get unionized, it caused the company to fold altogether. Umbarger replied that he really did not care for it but that he was management and, therefore, the Union would not do anything for him anyway.

After the February 28 union meeting, Umbarger walked up while Joseph Bennett was talking to an employee about the Union. Umbarger said that someone from the home office had come down and said that if the Union got in, they were going to close the doors.

Surveillance

On the occasion when Rick Johnson phoned Jim Dunn shortly after the February 28 union meeting, Johnson asked Dunn who was responsible for starting the union movement. Subsequently, as shown above, Dunn changed his mind and told William Kennedy that he did not want to support the Union. Kennedy told Dunn that Dunn's name had come up.

Hildegard and Edwin Kirk, Eddie Landers, Rocky Terrel, and Joseph Bennett saw General Manager Rick Johnson drive up to the union hall at the time of a March 13, 1999 union meeting. Rocky Terrel followed Johnson as Johnson drove around the block a couple of times then Johnson turned in to the union hall parking area. Johnson's wife was also in his car. Johnson was driving a white sports vehicle. Hildegard Kirk testified that Rick Johnson does not normally work on Saturdays, which was the day of the meeting. Johnson lives approximately 1 hour's drive from the union hall. Union organizer Eddie Landers went out as Johnson was driving out of the union hall parking area and asked Johnson to come in the meeting. Johnson said that he was just driving around watching the snow.

Threat of Pay Cut; Told Employees They had Terminated Others because of the Union; Told Employees it would be Futile to Select the Union

General Manager Rick Johnson talked with owner/operator Angela Loyall around March 17, 1999. Johnson asked if Loyall wanted to be the bearer of bad news and that she should tell them there was not going to be a union. Johnson said, "you noticed that Ed and Hilda aren't here and the union said they'd get their jobs back." Johnson asked Loyall if she could stand a $500 pay cut. Johnson said the Union was Mafia. He told Loyall there would be armed guards at the facility after discussing that someone had thrown firecrackers in to the bay. Johnson said because the owner/operators were independent contractors they could not have a union.

Discriminatory Enforcement of No-solicitation Rule

As shown herein a day or two after March 17, William Kennedy issued Tom McHargue a warning (GC Exh. 38) for soliciting for the Union. Kennedy issued the written warning to Thomas McHargue because company driver Bob Calahan told him that another driver, Joe Iskey, told Calahan that Tom McHargue has been bothering Iskey about the Union, about joining the Union. Kennedy talked with Iskey and Iskey confirmed what Calahan had told Kennedy. Kennedy then talked to McHargue and issued the warning.

Kennedy also told Rocky Terrel not to solicit for the Union during company time. He explained that he told Terrel that because he was afraid that violence would ensue if Terrel did not leave a driver alone about the Union.

Thomas McHargue knew of employees selling products before his warning. He has sold Amway products to Freddie Johnson around the first of March 1999. Freddie Johnson is the wife of General Manager Rick Johnson and an owner/operator driver. In Respondent's case, William Kennedy testified that McHargue sold Amway products when Respondent was US Delivery and that US Delivery did not have a no-solicitation

[23] Dunn's testimony as well as testimony by other witnesses regarding Rick Johnson, was not in dispute. Johnson did not testify.

[24] "Houston" refers to Respondent's main office.

rule. Kennedy's testimony conflicts with that of McHargue in view of McHargue's recollection that he sold Amway products in March 1999. At that time Respondent was not US Delivery and Respondent did have a no-solicitation rule.

Former owner/operator Bennett testified that employees bought and sold charitable goods at work. He bought candy that was being sold by an employee for the employee's daughter.

Handbook Rule Against Discussing Wages

Respondent admitted that its employee handbook includes the following:

> *Discussion of one's own pay rate or that of any other employee is strongly discouraged. One's own pay information should not be discussed with other than the employees' own supervisor or the Human Resources representative.*

Findings

Credibility

As shown above, I was impressed with both the demeanor and testimony of Hildegard and Edwin Kirk, Rocky Terrel, and Joseph Bennett. I credit their testimony. William Kennedy was inconsistent in his testimony. Kennedy was also evasive on cross-examination. In consideration of his demeanor and full testimony, I do not credit him to the extent his testimony conflicts with credited evidence. I was impressed with the demeanor of Angela Loyall, Thomas McHargue, Eddie Landers, and Jim Dunn. In some measure, other evidence supported their testimony. I credit the testimony of those witnesses to the extent it does not conflict with other evidence as explained here.

Conclusions

Interrogation

Several courts of appeal have adopted the test applied in *Bourne v. NLRB*, 332 F.2d 47 (2d Cir. 1964), in determining whether an employer has engaged in unlawful activity by interrogating employees. There are eight factors included in the Bourne test: (1) the history of the employer's attitude toward its employees; (2) the nature of the information sought or related; (3) the rank of the questioner in the employer's hierarchy; (4) the place and manner of the conversation; (5) the truthfulness of the employee's response; (6) whether the employer had a valid purpose in obtaining the information; (7) whether a valid purpose, if existent, was communicated to the employee; and (8) whether the employer assured the employee of no reprisals. *NLRB v. Brookshire Grocery Co.*, 919 F. 2d 359 (5th Cir. 1990); *NLRB v. McCullough Environmental Services,* 5 F.3d 923 (5th Cir. 1993).

Shortly after a February 28 union meeting, General Manager Rick Johnson phoned owner/operator Jim Dunn and asked Dunn who had started the Union.

Around March 17 to 19, 1999, admitted employee Thomas McHargue was questioned by Respondent's highest ranking official in Oklahoma at its Oklahoma City facility. Kennedy told McHargue that he had been soliciting for the Union and he asked McHargue if he had any comments.

There was no showing whether Respondent had a history of antiunion attitude before this matter. As to the nature of the information sought, Dunn was asked to identify the employees that started the Union and McHargue was required to defend the accusations that he engaged in solicitation for the Union. The questioners were the two highest ranking officials at Oklahoma City. Rick Johnson questioned Dunn in a phone conversation. McHargue was questioned in the highest ranking official's office in the presence of another supervisor. McHargue was alone. Dunn did not name any employees and McHargue denied the allegations against him. There was no evidence that Respondent had a valid purpose in questioning Dunn and McHargue and no valid purpose was communicated to either Dunn or McHargue. Neither of the two was given any assurance against reprisals.

I find that evidence illustrated that Dunn and McHargue were interrogated in violation of Section 8(a)(1) of the Act.

Threat of Closure

The evidence illustrated that Supervisors Umbarger and Dawson threatened employee Hildegard Kirk with plant closure by telling her that the word has come down from Houston that Respondent would rather shut the door than let the Union in. Additionally, Dawson told Kirk that Wilson Food had folded because of the Union. Umbarger also threatened employee Joseph Bennett that Respondent would close its doors if the Union came in. General Manager Rick Johnson threatened Jim Dunn[25] that Respondent would close its doors and none of us would have a job.

I find that evidence proved that Respondent threatened plant closure and loss of jobs because of the Union in violation of Section 8(a)(1). *Interstate Truck Parts*, 312 NLRB 661 (1993); *Almet, Inc*., 305 NLRB 626 (1991).

Surveillance

General Manager Rick Johnson drove around the union hall several times and through the hall parking lot once, during a union meeting with Respondent's employees on March 13, 1999. That action plus Johnson's phone call to employee Jim Dunn after the first union meeting, illustrated to the employees that Johnson was engaged in surveillance of their union meeting. That understanding was reinforced by William Kennedy's comment to Jim Dunn within 2 weeks following March 13, that Dunn's name had come up as supporting the Union. All that evidence illustrated that Respondent engaged in surveillance of its employees union activities in violation of Section 8(a)(1) of the Act. *McLean Roofing Co.*, 276 NLRB 830, 833 (1985).

Threat of Pay Cut; Told Employees They had Terminated Others Because of the Union; Told Employees it Would be Futile to Select the Union

The undisputed evidence proved that employee Angela Loyall was threatened by General Manager Johnson that the Kirks had not been reinstated despite claims from the Union and that she should be prepared for a $500 pay cut. I find those comments constitute further violations of Section 8(a)(1). *Harper-Collins San Francisco*, 317 NLRB 168, 180 (1995); *Ace Cab, Inc*., 301 NLRB 119, 125 (1992).

[25] Rick Johnson did not testify. Jim Dunn's testimony regarding Johnson was not rebutted.

Discriminatory Enforcement of No-solicitation Rule:

Respondent selectively enforced a no-solicitation policy against union solicitation. The evidence proved that Respondent permitted employees to solicit other employees during work for such things as candy and Amway products. Despite the contrary testimony of William Kennedy I find that Respondent did permit that solicitation during material times including occasions as recently as March 1999. On the other hand Respondent prohibited its employees from soliciting for the Union and disciplined employee Thomas McHargue on information that McHargue had solicited for the Union. That action constitutes an additional violation of Section 8(a)(1). *McGaw of Puerto Rico, Inc*., 322 NLRB 438 (1993); *Frazier Industrial Co.*, 328 NLRB 717 (1999).

Handbook Rule Against Discussing Wages

The Board has consistently held that employer rules or policies prohibiting employees from discussing their pay are unlawful. As shown above, that is precisely the case here. Respondent's handbook includes a rule that discourages discussion of wages. That constitutes a violation of Section 8(a)(1). *Hilton's Environmental, Inc.,* 320 NLRB 437 (1995).

The 8(a)(3) Allegations; Discharge of Hildegard Kirk; Discharge of Edwin Kirk; Discharge of Joseph Bennett

Edwin and Hildegard Kirk started working as owner/operators for Respondent in the summer of 1998. Hildegard Kirk started on August 10, 1998.

H. Kirk testified that she started talking with other drivers about organizing a union in mid-February 1999. Joseph Bennett also talked with other drivers about the Union. Between February 15 and 18, H. Kirk and Rocky Terrel contacted Bobby Monroe, representative of the Union. They set up a meeting for the drivers at the Union's hall on February 28. H. Kirk told the other owner/operators about the meeting. In addition to H. Kirk, owner/operators Rocky Terrel, Cindy Terrel,[26] Jim Dunn, H. Kirk's husband Edwin Kirk, Joe Bennett, and Angela Loyall attended the February 28 meeting. Both Hildegard and Edwin Kirk as well as Joseph Bennett signed both the sign-in sheet[27] and a union authorization card during that meeting.

Union organizer Eddie Landers faxed a copy of the in-plant organizing committee (GC Exh. 35) to Respondent on Monday, March 1, 1999. The names or committee members printed in the order they appeared on that fax are Hilde Kirk, Edwin S. Kirk, Angela Loyall, Cindy Terrel, Rocky Terrel, Joe T. Bennett, and James M. Dunn. Landers then wrote and faxed Respondent on March 10, 1999, and advised Area Manager Kennedy that the Union was attempting to organize the company[28] carriers (GC Exhs. 36 and 37).

After the meeting, both Kirks solicited drivers to sign union authorization cards. Hildegard Kirk solicited the cards at the warehouse after work and when she visited other drivers. During the first week after the February 28 meeting she received five signed union cards.

As shown above, Hildegard Kirk testified about talking with two supervisors on and after March 4 or 5, 1999. Some 8(a)(1) allegations stem from those conversations. As shown above under Section 8(a)(1), Operations Manager David Umbarger threatened Joseph Bennett that Respondent would close the doors before the Union got in.

Both Hildegard and Edwin Kirk were terminated on March 9. Edwin Kirk was called in off his route. When he arrived his wife, Hildegard was already there. She told him she had been fired. When she reported for work that evening David Umbarger told her to see Bill (William) Kennedy. Kennedy called General Manager Rick Johnson on the intercom and handed H. Kirk her termination notice. Hildegard Kirk testified that she had never had problems with her work before March 9. Afterward, Rick Johnson escorted Edwin Kirk back to Kennedy's office. Kennedy handed Kirk his termination letter and asked Kirk to sign the letter. Kirk signed the letter and left. There was never any indication that Respondent was unhappy with Edwin Kirk's work.

Bennett was terminated on March 12, 1999. William Kennedy came into Rick Johnson's office and handed Bennett his termination letter. Bennett asked if Kennedy wanted him to finish out his route and Kennedy replied no. Bennett asked if Kennedy was going to give him a reason and Kennedy replied "nope." Bennett signed the termination letter and handed it back to Kennedy. Before that incident nothing had been said to show that Respondent was unhappy with Bennett's work.

William Kennedy initially testified that he made the decision to discharge Hildegard and Edwin Kirk and Joseph Bennett because he was authorized to take that action by his contracts with those owner/operators. Subsequently, Kennedy testified that he had "some problems" with Hildegard Kirk and Joe Bennett in the past. He testified that Hildegard Kirk was hard to get along with and was hard on operations. He had no problems with Edwin Kirk but terminated him because he was married to Hildegard. Kennedy did not remember the last time he had problems with Hildegard Kirk but he testified that the problem on that occasion was her pay. Subsequently, in response to a leading question, Kennedy said the last problem over Hildegard Kirk's pay occurred approximately a week before her termination. Kennedy could not recall the last time he had a problem with Bennett. But he testified that Bennett was obstinate. However, there was no straw that broke the camel's back and led directly to the termination of Bennett.

Kennedy admitted that he gave no reason to the Kirks or to Joe Bennett for their terminations.

Written Warning to Thomas McHargue

Thomas McHargue is a company driver for Respondent. McHargue is not an owner/operator. He has worked there for 9 years. McHargue attended a March union meeting at the Teamsters hall. He saw General Manager Rick Johnson drive out of the union parking area. The following workday in Respondent's

[26] Cindy Terrel is not an owner/operator or an employee of Respondent. Instead her husband, Rocky Terrel, employs Cindy Terrel as a driver. Rocky Terrel is an owner/operator.

[27] The owner/operators that attended that meeting including Bennett actually printed their name on a letter advising Respondent area manager of the Union's in-plant organizing committee (GC Exh. 35).

[28] Respondent does not dispute that the company drivers are employees.

Back Bay, Johnson said to McHargue, "you had a short turnout didn't you."

A day or two after March 17, Carol Miller told McHargue to follow her to William Kennedy's office. Kennedy said to McHargue, "You've been soliciting at McKesson." McHargue replied, "Have you looked at my route sheets, I don't even go to McKesson." Nevertheless, Kennedy issued McHargue a warning (GC Exh. 38) for soliciting for the Union. McHargue told Kennedy that he did not solicit for the Union.

McHargue testified that employees sold products before his warning. He sold Amway products to Freddie Johnson around the first of March 1999. Freddie Johnson is the wife of General Manager Rick Johnson and an owner/operator driver. In Respondent's case William Kennedy testified that McHargue sold Amway products when Respondent was US Delivery and that US Delivery did not have a no-solicitation rule.

William Kennedy admitted that he issued a written warning to McHargue on March 17, 1999 (GC Exh. 38). Kennedy issued the warning because company driver Bob Calahan told him that another driver, Joe Iskey, told Calahan that Tom McHargue has been bothering Iskey about the Union, about joining the Union. Iskey told Calahan that he had better get somebody to do something about McHargue or he was going to tear his head off. Kennedy talked with Iskey and Iskey confirmed what Calahan had told Kennedy. Kennedy then talked to McHargue and issued the warning.

Findings

Credibility

As shown above, I credit the testimony of Hildegard and Edwin Kirk, Rocky Terrel, Joseph Bennett, Angela Loyall, Thomas McHargue, Eddie Landers, and Jim Dunn. I do not credit the testimony of William Kennedy.

Conclusions[29]

I shall first consider whether the General Counsel proved that Respondent terminated Hildegard and Edwin Kirk and Joseph Bennett, and issued a written warning to Thomas McHargue because of union animus. *Manno Electric,* 321 NLRB 278 fn. 12 (1996); *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983).

The credited evidence showed that the Kirks and Bennett engaged in union activity including attending a union meeting for Respondent's drivers before their terminations. All three attended the February 28 union meeting and signed up as in–plant organizing committee members (GC Exh. 35).[30] Eddie Landers testified that he faxed that list of in-plant organizers to Respondent on March 1, 1999. William Kennedy denied that Respondent received the list from Landers. In view of my credibility findings as shown above, I am convinced that the Union did fax that list to Respondent on March 1, 1999. As shown above, the Kirks were the first two names on that list.

On February 28, General Manager Rick Johnson phoned Jim Dunn. Dunn was present at the February 28 union meeting and had signed the in-plant committee sheet. Johnson asked Dunn who was responsible for starting the union movement. Dunn responded that he did not know. Johnson told Dunn that a memo from the home office had been sent down saying they would close the doors and none of us would have a job.

After February 28, Assistant Night Manager Umbarger told Joseph Bennett that word from the home office was that if the Union got in they were going to close the doors. On March 4 or 5 Hildegard Kirk talked with Supervisors Umbarger and Dawson about the Union. Umbarger told Kirk that he had heard about the Union and the word from Houston was that Respondent would rather shut the door than let the Union come in. Barbara Dawson said the union caused Wilson Food to fold.

When Jim Dunn told Area Manager Kennedy that the Union was not the answer, Kennedy told Dunn that his name had come up. That comment illustrated that Respondent had discussed employee support for the Union.

After the February 28 meeting, each of the Kirks and Bennett solicited other drivers to sign union authorization cards.

The record including especially the above-mentioned evidence, proved that the owner/operators were employees as defined in the Act; both Hildegard and Edwin Kirk and Joseph Bennett, engaged in union activity; Respondent learned of their union activity; Respondent demonstrated its union animus; Respondent's termination of the Kirks and Bennett coincided with its learning of their union activity; and Respondent had no basis other than union activity, to terminate the Kirks and Bennett. I find that Respondent terminated Hildegard and Edwin Kirk and Joseph Bennett because of its union animus.

I shall also consider whether the record proved that Respondent would have discharged the Kirks and Joseph Bennett in the absence of their union activity. The General Counsel asked William Kennedy for the reason he discharged Hildegard and Edwin Kirk and Joseph Bennett. He responded that he terminated them because he had that right under their contract with

[29] Respondent contended that regardless of whether it engaged in unfair labor practices those practices were disavowed in a March 18, 1999 memorandum to employees (R. Exh. 18). That memo included the following paragraph:

> I have also heard that some persons in management are alleged to have made threatening statements to employees with regard to the ongoing union organizing efforts. I want each and every one of you to know that these statements, if true, do ***not*** reflect Company policy. *This Company does not and will not retaliate against any employee for exercising their lawful rights. Let me repeat that: This Company does not and will not retaliate against* ***any*** *employee for exercising their lawful rights*. I personally pledge to each and every one of you that I will hold everyone here accountable for complying with this policy, and I will not tolerate any deviation from it.

The above memo does not qualify as a disavowal *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978). It was not specific to the unfair labor practices found here and it failed to repudiate any of its misconduct that had occurred before issuance of the memo. Of significance is the memo's emphasis on the word employee. At that time Respondent was advising owner/operators they were not employees. Moreover, despite Respondent's contention to the contrary, the memo does not show that Respondent had no animus against Union activity.

[30] The initial in-plant organizing committee included the names Hilde Kirk, Edwin S. Kirk, Angela Loyall, Cindy Terrel, Rocky Terrel, Joe T. Bennett, and James M. Dunn.

Respondent. Subsequently Kennedy testified that he had some problems in the past with Hildegard Kirk and Joseph Bennett and Edwin Kirk was married to Hildegard. However, the record does not support my finding that Respondent discharged the Kirks or Joseph Bennett for anything other than their union activities. None of the grounds for discharge was alleged or proved to have occurred proximate to the discharges. For example, as to Hildegard Kirk and Joseph Bennett, there was no showing of any occurrence that precipitated Respondent's decision to terminate either of them.[31] As to Edwin Kirk, William Kennedy admitted that nothing occurred regarding Kirk's work, which justified his termination other than the fact that Kirk was married to Hildegard. However, the Kirks' marriage did not commence proximate to their discharge. There was no credible showing of anything including disciplinary action, notes, recollection or other evidence that any of the three terminated employees engaged in any activity other than union activity which led to their termination.

I find that Respondent terminated Hildegard Kirk, Edwin Kirk, and Joseph Bennett because of its union animus and Respondent failed to prove that it would have terminated either of the Kirks or Bennett in the absence of union activities.

As to the written warning to McHargue, the record shows that warning was given despite that fact that employees were permitted to solicit for matters other than the Union. McHargue was identified by Respondent as supporting the Union when he attended the March 13 union meeting. As shown above, General Manager Rick Johnson's comments to McHargue proved that Johnson knew that McHargue attended that meeting. Moreover, William Kennedy's comments to McHargue at the time he issued the written warning, illustrated that Kennedy thought that McHargue was engaged in union activities.

The record proved that Respondent did not discipline employees for solicitation but that it warned McHargue because it suspected McHargue was engaged in union solicitation and Respondent failed to prove that it would have warned McHargue in the absence of union activities.

I find that Respondent terminated Hildegard Kirk, Edwin Kirk, and Joseph Bennett and issued a written warning to Thomas McHargue in violation of Section 8(a)(1) and (3) of the Act.

CONCLUSIONS OF LAW

1. Corporate Express Delivery Systems is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Teamsters Local 886, affiliated with International Brotherhood of Teamsters, AFL–CIO, CLC is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent, by interrogating its employees about the Union; threatening its employees with plant closure if they select the Union; engaging in surveillance of its employees union activities; threatening its employees with a cut in pay, and threatening that it would be futile for the employees to support the Union; by discriminatorily enforcing a no-solicitation rule against union solicitation; and by maintaining an illegal rule discouraging its employees from discussing employee pay, has engaged actions in violation of Section 8(a)(1) of the Act.

4. Respondent, by terminating its employees Hildegard Kirk, Edwin Kirk, and Joseph Bennett and issuing a written warning to its employee Thomas McHargue has engaged in conduct violative of Section 8(a)(1) and (3) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6), (7), and (8) of the Act.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

In view of my finding that Respondent illegally terminated Hildegard Kirk, Edwin Kirk, and Joseph Bennett, in violation of sections of the Act, I shall order Respondent to offer those employees immediate and full employment to their former positions or, if those positions no longer exist, to substantially equivalent positions. I order Respondent to erase all reference to the terminations of Hildegard Kirk, Edwin Kirk, and Joseph Bennett and its written warning to Thomas McHargue. I further order Respondent to make those employees whole for any loss of earnings suffered as a result of the discrimination against them. Backpay shall be computed as described in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as described in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[32]

ORDER

The Respondent, Corporate Express Delivery Systems, Oklahoma City, Oklahoma, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating its employees about the Union; threatening its employees with plant closure if they select the Union; engaging in surveillance of its employees union activities; threatening its employees with a cut in pay if the employee support the Union, threatening that it would be futile for the employees to support the Union; by discriminatorily enforcing a no–solicitation rule against union solicitation; and by maintaining an illegal rule discouraging its employees from discussing their pay.

[31] As shown above, Kennedy initially testified that he had some problems with Hildegard Kirk regarding her pay and that he could not remember the last time he had problems with her. After leading questions Kennedy testified that the last problem with Hildegard Kirk occurred within a week of her termination. In view of my overall determination of Kennedy's credibility and especially the apparent incongruity of his testimony in this regard, I do not credit his testimony that he discharged Hildegard Kirk because he had problems with her including problems over her pay.

[32] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Terminating its employees and issuing a written warning to its employees because of the Union.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days of this Order, offer immediate and full employment to Hildegard Kirk, Edwin Kirk, and Joseph Bennett to their former positions or if those positions no longer exist, to substantially equivalent positions without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them and employee Thomas McHargue whole for any loss of earnings and other benefits suffered as a result of the discrimination against them plus interest, in the manner set forth in the remedy section of the decision.

(b) Within 14 days from the date of this Order, remove from its files any reference to the written warnings and discharges of Thomas McHargue, Hildegard Kirk, Edwin Kirk, and Joseph Bennett and within 3 days thereafter notify those employees in writing that this has been done and that the warnings and discharges will not be used against any of them in any way.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, and timecards, personnel records, reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Oklahoma City, Oklahoma, copies of the attached notice.[33] Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Within 21 days after service by the Region, file with the Regional Director, Region 17, a sworn certification of a responsible official on a from provided by the Region attesting to the steps that the Respondent has taken to comply.

[33] If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."